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From: Josh Berman <josh.berman@sierraclub.org>
Sent: Tuesday, October 17, 2017 3:52 PM
To: FOIA HQ
Subject: Submittal of FOIA request to EPA HQ
Attachments: 2017 10 17 Sierra Club ozone communications FOIA.pdf

Dear Freedom of Information Act Officer:

Please find attached a FOIA request that I am submitting on behalf of the Sierra Club. Please note that I have concurrently submitted this request through the FOIA Online system. Please contact me with any questions regarding this request.

Thank you,

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October 17, 2017

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

BY FOIA ONLINE
BY EMAIL: hq.foia@epa.gov

RE: FOIA Request Regarding Ozone Standards

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), the Sierra Club respectfully requests copies of the following records¹ in EPA's possession:

Any and all records of communications subsequent to November 7, 2016, regarding the national ambient air quality standards for ozone between (A) people and organizations outside EPA and (B) members of the transition, beachhead, and landing teams in any EPA office and EPA staff in the Office of the Administrator (Immediate Office), Office of Congressional and Intergovernmental Relations, Office of the Executive Secretariat, Office of Policy, Office of Public Affairs, Office of Air and Radiation, and Office of General Counsel.

Relevant search terms include, but are not limited to, "ozone standard," "ozone standards," "ozone NAAQS," "national ambient air quality standard for ozone," "national ambient air quality standards for ozone," and all of those phrases with the word "ozone" replaced by the term "O3."

It may be possible for us to further limit this request if we have a better idea of the nature and scope of the records in your files. Please contact me to discuss this possibility. In addition, to the extent that records responsive to this request are available in a widely-used electronic format (e.g., pdf, Excel, Word, or WordPerfect files), we would prefer to receive them in that format, provided that the electronic versions are in comprehensible form.

¹ As used throughout this letter, the terms "record" and "records" shall mean all materials in whatever form (handwritten, typed, electronic, or otherwise produced, recorded, reproduced or stored) in EPA's possession, including, but not limited to, any correspondence, minutes of meetings, memoranda, notes, e-mails, notices, electronic files, internet chat logs, tapes, photos, videos, text messages, and telefaxes. Note that this request specifically seeks responsive records in or on the personal computers, cellphones, or other devices, or personal email accounts used by any federal employee or official if used for any government purpose.

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless, as such disclosure would serve the public interest of educating citizens and advancing the purposes of the Clean Air Act.

We also request that responsive records be released as soon as they are available, on a rolling basis, but in no event later than 20 days, as required by law. To the extent that some subset of the requested records is readily available and can be provided immediately, please send it immediately while EPA searches for other records.

REQUEST FOR FEE WAIVER

The Sierra Club requests a waiver of all fees in connection with this FOIA request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l). FOIA carries a presumption of disclosure and Congress designed FOIA's fee waiver provision to allow nonprofit public interest groups—such as the Sierra Club—to access government documents without the payment of fees.

As explained below, this FOIA request satisfies the factors listed in EPA's governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 40 C.F.R. § 2.107(l)(1). Courts have stated that the statute “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy)).

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The subject matter of this request relates to the review and implementation of environmental regulations and policies affecting public health and welfare. It is clear that such actions, as well as EPA's overall implementation and execution of environmental laws, are specific and identifiable activities of an executive branch agency of the government. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003) (“[R]easonable specificity” is “all that FOIA requires” with regard to this factor). Thus, this FOIA request plainly concerns the operations or activities of the government.

2. The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.”

There is no question that the records requested will contribute to an understanding of federal government operations. The request likely will result in disclosure of records not already in the public domain. The requested records will provide important information regarding input to EPA's decisionmaking by parties that have an interest in the outcome of that decisionmaking, as well as the development of EPA's public statements about a matter of great public concern—

the health- and welfare-protective national ambient air quality standards for ozone. Such information will allow better understanding of government operations, and in particular, who is attempting to influence EPA action, and responses by EPA to such attempts. The records are likely to also disclose what reasons EPA might have for taking or not taking certain actions in regard to the environmental and human health impacts that it oversees. These records are not publicly available as a general matter. Thus, production of the requested records is "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552 (a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(2).

In this instance, the requested records will likely provide new information about communications by and input from industries and others regarding EPA's actions to implement the nation's key environmental laws. See *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987) (FOIA's legislative history "suggests that information has more . . . potential [to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations."). Accordingly, the records sought by this request will provide important oversight of EPA operations by revealing the extent to which such interests are attempting to influence EPA policy, and EPA's response to those attempts. See *Community Legal Services v. HUD*, 405 F. Supp. 2d 553, 560 (E.D. Pa. 2005) ("[T]he CLS request would likely shed light on information that is new to the interested public.").

3. The disclosure of the requested information will contribute to "public understanding."

The information requested will contribute to public understanding of the involvement of outside entities in efforts to affect the protections provided by and through the national ambient air quality standards for ozone, as well as EPA's response thereto. The information requested will also help provide Sierra Club, its members and supporters, and the public that Sierra Club disseminates information to with insight into what outside entities are seeking to influence the agency, the kinds of input EPA policymakers are or may be receiving directly or indirectly from these outside entities, and EPA's responses thereto. The records' release is not only "likely to contribute," but is in fact certain to contribute significantly to better public understanding of the operations or activities of the government as described above. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(2).

Public understanding of the new information will be achieved because Sierra Club intends to use the new information that it receives to educate the public by informing the public about the above-described communications.

In determining whether the disclosure of requested information will contribute to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dep't of Justice*, 19 F.3d 807 (2d Cir. 1994). Sierra Club need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law requir[es] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for Sierra Club to show how it distributes information to the public generally. *Id.*

The Sierra Club also unquestionably has the “specialized knowledge” and “ability and intention” to broadly disseminate the information requested in a manner that contributes to the understanding of the “public-at-large.” Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, including, but not limited to: analysis and distribution to the media, distribution through publication and mailing, posting on the Club’s website, emailing and list serve distribution to our members and supporters across the U.S., and via public meetings and events. Every year the Sierra Club website receives roughly 40,730 unique visits and 100,381 page views; on average, the site gets 104 visits per day. Sierra Magazine, which is a quarterly magazine published by the Sierra Club, has a circulation of approximately 1,000,000. Sierra Club Insider, an electronic newsletter, goes to over 850,000 people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system. Sierra Club’s detailed description of its capacity and will to disseminate information gathered from the requested records demonstrates that disclosure of the records will contribute to public understanding. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (requester demonstrates likelihood of contributing to public understanding of government operations and activities where it specifies multiple channels for disseminating information and estimated viewership numbers).

4. The disclosure is likely to contribute significantly to public understanding of government operations or activities.

The foregoing discussion makes clear that disclosure is likely to provide new information to the public that will contribute significantly to its understanding of the review and implementation of environmental and public health protections established by the government. The request seeks information that is not publicly available about, among other things, who is seeking to influence EPA’s regulatory actions, the extent of those efforts, and the effectiveness of their attempts to do so, and Sierra Club has a track record of disseminating information regarding issues, policies, and laws relating to the environment and public health. Accordingly, the requested records are likely to contribute significantly to public understanding of government operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(2).

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

The Sierra Club has no commercial interest in the requested records. Nor does the Sierra Club have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. The Sierra Club is a tax-exempt organization under section 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of Sierra Club’s mission to inform the public on matters of vital importance to the environment and public health.

For all the foregoing reasons, dissemination of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government. Accordingly, we request that you waive all fees in connection with this request pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

If you deny this fee waiver request, in whole or in part, please notify us before incurring search and copy expenses.

CONCLUSION

Please email or (if it is not possible to email) mail the requested records to me at the office address listed below. Please send them on a rolling basis; EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines). If EPA concludes that any of the records requested here are publicly available, please let me know.

If you find that this request is unclear in any way, or that the number of records responsive to this request is relatively large or difficult to copy, please do not hesitate to call me at (202) 650-6062. You can also reach me by email at: josh.berman@sierraclub.org.

Thank you for your assistance.

Respectfully submitted,



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